In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 861

LEONARD BURTMAN AND BENEDICT HIMMEL,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 1970. A petition for rehearing was denied on August 18, 1970. Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to October 16, 1970, and on that date the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

412-847—70

QUESTION PRESENTED

Whether out-of-court statements by petitioner's co-conspirators were made in furtherance of the objectives of the conspiracy and thus were properly admitted into evidence.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of conspiring to defraud the United States in violation of 18 U.S.C. 371 by bribing a customs inspector (J.A. 3a–5a).[1] Each was fined $5,000 and sentenced to imprisonment for one year. The court of appeals affirmed (Pet. App. A). As to two co-defendants, Charles Tourine and Pasquale Giordano, the jury could not reach a verdict.

The evidence showed that in late April 1968, United States customs inspectors seized a twenty-crate shipment of lewd picture booklets after a crate accidentally broke open on the New York docks. The shipment, which originated in Denmark, was invoiced as cups and saucers and addressed to Pacific Coast Distributors, 114 West 20th Street, New York (J.A. 76a, 346a–349a, 804a). Pacific Coast Distributors had received a similar shipment from Denmark in December 1967. That earlier shipment of lewd booklets was also invoiced as earthenware (J.A. 794a). The customs invoice for this prior shipment was approved and initialed by Michael Cassotta, supervisor of the

[1] "J.A. refers to the two-volume joint appendix to petitioners' brief in the court of appeals, which is on file with the Clerk of the Court.

customs unit specializing in ceramics and earthenware. If the second shipment had not broken open, it too would have been handled by Cassotta's unit (J.A. 279a, 281a).

The customs forms for both these shipments were prepared by the Alba Forwarding Company, a firm of customshouse brokers (J.A. 312a, 317a–318a). Alba Forwarding relied upon invoices furnished by a Mr. Grasberg of Pacific Coast Distributors representing the shipments as earthenware cups and saucers (J.A. 313a, 318a). An officer of Alba Forwarding placed telephone calls to petitioner Burtman's number and spoke with both petitioners Burtman and Himmel concerning the shipments (J.A. 96a, 314a–316a). Before the first shipment, petitioner Burtman arranged with one Morris Drucker to use the latter's printing plant at 114 West 20th Street, New York, as the mailing address for Pacific Coast Distributors (J.A. 321a, 323a–324a). Petitioner Himmel supervised the uncrating of the first shipment at that address (J.A. 335a).

One Alan Murray, an undercover agent for the Bureau of Customs (J.A. 436a–437a), testified concerning four meetings he attended among petitioners and co-defendants Tourine and Giordano. The first meeting occurred on May 7th or 8th, 1968 at the midtown Manhattan office of petitioners Burtman and Himmel, both of whom were present (J.A. 74a–75a). Petitioners discussed the seizure by customs authorities of a shipment of "beaver".[3] They noted that officials were investigating the shipment, but ex-

[3] Pictures showing pubic hair.

pressed confidence that it could be traced only to Mr. Grasberg (J.A. 76a–77a). Petitioners said that Grasberg, who arrived during the meeting, was being paid to "take the rap" (J.A. 77a–78a). Both petitioners assured Grasberg that he would be "taken care of" (J.A. 81a).

At a second meeting two days later, according to Murray's testimony, petitioners again discussed the shipment seized by customs. Burtman mentioned that a customs inspector had been paid to pass falsely invoiced shipments. Petitioners debated what this customs officer would do now that a shipment had been seized. Burtman said he would not talk. Himmel sought reassurance on this point and Burtman said the man had been paid (J.A. 78a–81a).

Petitioner Himmel was not present at the third meeting, which took place at Patsy's Restaurant in New York on May 17th, 1968. Petitioner Burtman and co-defendants Tourine and Giordano were there (J.A. 82a–83a, 134a). Burtman asked Tourine whether he was certain that the customs inspector would "stand up". Tourine responded affirmatively, mentioning that the man's name was Cassotta and that he had been paid $1,000 and $3,000. Someone mentioned that Cassotta was hospitalized with a heart attack. Petitioner Burtman and Tourine and Giordano agreed that everyone should "sit tight" (J.A. 92a–94a).

Neither petitioner attended the fourth meeting (also covered by Murray's testimony), which was held at Tourine's Manhattan apartment. Defendants Tourine and Giordano were there. Giordano asked

Tourine if he was certain Cassotta would not talk. Tourine replied that the customs inspector had been taken care of and that his illness would make him difficult for authorities to question. Giordano and Tourine once again agreed to sit tight (J.A. 94a–95a).

Defendant Tourine, testifying in his own behalf, contradicted agent Murray's testimony concerning him. As to the third meeting, Tourine acknowledged having been at Patsy's Restaurant but denied the remarks attributed to him (J.A. 465a). As to the fourth meeting, he said Murray had never been to his apartment (J.A. 486a). Petitioners' attorney declined to cross-examine Tourine (J.A. 487a–488a).

The court of appeals held that the statements by petitioners and co-defendants testified to by agent Murray fell within the hearsay exception for admissions against interest and were therefore properly allowed into evidence (Pet. App. 5a).

Accordingly, the court found it unnecessary to pass upon the government's argument that the statements were admissible as co-conspirators' statements (Pet. App. 5a).

ARGUMENT

The petition is premised upon the contention that the admission of testimony about co-defendants' out-of-court statements raises a question under *Bruton* v. *United States*, 391 U.S. 123. That question is not, however, raised, because agent Murray's testimony about the meetings of the defendants was admissible, wholly apart from the court of appeals' conclusion that it was a report of statements against interest, under the co-conspirator exception to the hearsay rule.

The established rule in the federal courts is that out-of-court declarations of a conspirator are admissible against his co-conspirators, if made during the pendency and in furtherance of the objectives of the conspiracy charged in the indictment. *E.g.*, *Lutwak* v. *United States*, 344 U.S. 604, 616–618; *Krulewitch* v. *United States*, 336 U.S. 440, 442–443. See *Dutton* v. *Evans*, No. 10, this Term, decided December 15, 1970. Here the indictment charged petitioners with conspiracy to defraud the United States by paying customs inspector Cassotta to perform his duties improperly. Petitioners were engaged in the business of importing falsely invoiced lewd booklets, and the success of their enterprise depended upon their obtaining the continuing cooperation of a customs inspector, not only at the time that the second shipment went through but after it was discovered. Petitioners and their co-conspirators met four times to discuss whether action was necessary to insure Cassotta's continued cooperation. Manifestly they were still engaged in an active attempt to carry out the objective, charged in the indictment, of inducing the customs agent to act in derogation of his duty.

This is not like the cases cited by petitioners holding that an agreement to commit a crime cannot be held necessarily to embody a conspiracy to conceal that crime. *Krulewitch* v. *United States*, *supra*; *Grunewald* v. *United States*, 353 U.S. 391; see also *Lutwak* v. *United States*, *supra*. In those cases the central object of the conspiracy had clearly been completed, but the Court emphasized in *Grunewald* that such attempts to conceal a completed conspiracy must be distinguished from

acts of concealment done to further the central objectives of an ongoing conspiracy, 353 U.S. at 405.[1]

Here concealment was a central objective of the conspiracy, not merely an effort to cover the traces of past misdeeds. Petitioners and co-defendants conspired to purchase Cassotta's cooperation in concealing the nature of the shipments and petitioners' connection with them. Far from marking the end of this conspiracy, the seizure of the second shipment made Cassotta's cooperation all the more important to the conspirators. The meetings called to deal with the emergency situation were part of the existing conspiracy. Petitioners' argument that all the defendants' cases should have been severed to prevent their post-conspiracy admissions from being used against each other therefore falls with its premise.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1970.

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[1] See *United States* v. *Etheridge*, 424 F. 2d 951, 963–964 (C.A. 6), which distinguishes *Krulewitch* and *Grunewald* on this basis.

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